

THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHARA CURTIS, CYNTHIA ALDRICH &
ALFRED CURRIER,

Plaintiffs,

v.

ILLUMINATION ARTS, INC., a Washington
corporation, ILLUMINATION ARTS
PUBLISHING, L.L.C., a Washington limited
liability company, JOHN M. THOMPSON,
and KIMMIE LYNN THOMPSON,

Defendants.

No. 12-00991-JLR

**THIRD MOTION FOR SANCTIONS AND
PARTIAL SUMMARY JUDGMENT**

**NOTE ON MOTION CALENDAR:
Friday, August 30, 2013**

I. INTRODUCTION AND RELIEF REQUESTED

More than 250 days after being served, the defendants have yet to respond to many of the plaintiffs' discovery requests. The Court has already sanctioned the defendants for their obstruction of the discovery process—twice. And the defendants have ignored the Court's Order—twice. The Court warned the defendants that continuing defiance of the Court's Orders could result in additional sanctions, including entry of default judgment. The prejudice to the plaintiffs' case caused by the defendants' behavior cannot be alleviated by additional monetary sanctions. The Court should follow-through with its warning and enter default judgment against the defendants.

II. EVIDENCE RELIED UPON

This Motion relies on the Declaration of Kurt E. Kruckeberg in Support of Plaintiffs' Motion to Compel Discovery and for Sanctions dated January 31, 2013 (Dkt. # 17) ("**Jan. 31 Kruckeberg Decl.**"), the Declaration of Kurt E. Kruckeberg in Support of Plaintiffs' Motion for Summary Judgment on Issues of Liability and Willfulness and for Permanent Injunction dated March 28, 2013 (Dkt. # 24) ("**Mar. 28 Kruckeberg Decl.**"), the Declaration of Kurt E. Kruckeberg in Support of Plaintiffs' Motion for Sanctions dated June 28, 2013 (Dkt. # 41) ("**June 28 Kruckeberg Decl.**"), the Supplemental Declaration of Kurt E. Kruckeberg in Support of Plaintiffs' Motion for Sanctions dated June 5, 2013 (Dkt. # 31) ("**June 5 Kruckeberg Decl.**"), the Declaration of Kurt E. Kruckeberg in Support of Plaintiffs' Third Motion for Sanctions and Partial Summary Judgment filed concurrently with this Motion ("**Kruckeberg Decl.**"), the Declaration of Cynthia Aldrich in Support of Plaintiffs' Third Motion for Sanctions and Partial Summary Judgment filed concurrently with this Motion ("**Aldrich Decl.**"), and the Declaration of Alfred Currier in Support of Plaintiffs' Third Motion for Sanctions and Partial Summary Judgment filed concurrently with this Motion ("**Currier Decl.**"), with exhibits, and other documents on file in this matter cited with reference to their ECF docket numbers.

III. STATEMENT OF FACTS

A. The Defendants Refused to Respond to Discovery Requests and the Plaintiffs' Attempts to Resolve the Dispute Without the Involvement of the Court.

On November 29, 2012, the plaintiffs served the defendants with their first set of discovery requests. (Jan. 31 Kruckeberg Decl. ¶ 2, Ex. A.) The defendants ignored the requests. (*Id.* ¶ 3.) After the deadline for response had passed, plaintiffs' counsel, Kurt Kruckeberg, requested a status update from defendants' counsel, Matthew King. (*Id.*) Mr. King requested an additional 30 days to respond to the requests, stating that the "volume of financial data" the plaintiffs had requested necessitated additional time for response. (*Id.* ¶ 4.) The plaintiffs extended to the defendants an additional 10 days to respond to financial records requests and asked that the defendants timely

1 respond to the remaining discovery requests. (*Id.*, Ex. B.) Yet, in the 30 days that followed, the
 2 defendants provided no response to the plaintiffs’ requests. (*Id.* ¶ 6, 12.) Mr. Kruckeberg
 3 repeatedly attempted to resolve the discovery dispute without involving the Court through
 4 correspondence and teleconferences with Mr. King dated January 2, 2013; January 3, 2013;
 5 January 4, 2013; January 9, 2013; January 18, 2013; and January 22, 2013. (*Id.* ¶¶ 3–5, 7.) The
 6 plaintiffs’ attempts to convince the defendants to comply with the Federal Rules were unavailing,
 7 and the plaintiffs filed their First Motion to Compel Discovery and for Sanctions, ECF Document
 8 No. 16, on January 31, 2013.

9 **B. The Court Sanctioned the Defendants and Ordered the Defendants to Respond to the**
 10 **Plaintiffs’ Discovery Requests.**

11 On February 20, 2013, this Court ordered the defendants to provide “complete responses
 12 without objection” to the plaintiffs’ written discovery. (Order Granting Mot. to Compel Disc. and
 13 for Sanctions, Dkt # 19 (“*First Sanctions Order*”), at 6.) The Court held that the defendants
 14 waived any objections they might have had to the discovery requests and ordered the defendants to
 15 provide complete responses “no later than March 1, 2013.” (*Id.* at 6, 8.) The Court also ordered the
 16 defendants and the defendants’ counsel to pay sanctions to the plaintiffs in the form of the
 17 plaintiffs’ reasonable expenses and attorneys’ fees incurred in bringing its first motion for
 18 sanctions. (*Id.* at 8.)

19 **C. The Defendants Refused to Comply with the Court’s Order, and the Plaintiffs Again**
 20 **Attempted to Resolve the Dispute Without Involvement of the Court.**

21 That same day, February 20, 2013, the defendants served the plaintiffs with their initial
 22 responses to the plaintiffs’ discovery requests. (June 5 Kruckeberg Decl., Ex. A.) Despite the fact
 23 that the Court had ordered the defendants to respond to all of the discovery requests *without*
 24 objection, the defendants objected to all requests for production and interrogatories related to
 25 Mrs. Thompson’s finances. (*Id.*) After receiving the defendants’ inadequate answers and
 26 objections to all requests related to Mrs. Thompson, Mr. Kruckeberg sent a letter to Mr. King
 reminding him that the Court had ordered “complete responses without objection.” (*Id.*, Ex. A, at

2.) Mr. Kruckeberg proposed a discovery conference to address the matter in order to avoid the Court's further involvement. (*Id.*, Ex. A, at 3.) Mr. King did not respond, so Mr. Kruckeberg left a voice message the following day and sent Mr. King an e-mail to renew the request for a conference. (*Id.*, Ex. B.) Mr. King responded that evening, stating that he had forwarded Mr. Kruckeberg's letter to the defendants. (*Id.*, Ex. C.) Mr. King and Mr. Kruckeberg then agreed to a teleconference on Friday, February 29, 2013. (*Id.*, Ex. D.) Over the next few days, the defendants began producing some tax records relating to Mr. Thompson and the corporate entities, but the defendants persisted in refusing to produce any information regarding Mrs. Thompson. (*Id.* ¶ 6.)

On the day of the planned teleconference, Mr. Kruckeberg attempted to contact Mr. King by phone and e-mail to remind him of their planned teleconference. (*Id.*, Ex. E.) Mr. King ignored the parties' discovery conference and instead wrote an e-mail later that day, stating that his client had "dropped off all the documents he had with [plaintiffs' counsel's] office." (*Id.*, Ex. F.) The defendants also stated that they would make a number of documents available for inspection "the week of March 18, 2012 [sic]" and stated that they would "produce the other documents shortly."¹ (*Id.*, Ex. F.) Given the defendants' history of discovery gamesmanship, Mr. Kruckeberg requested that the parties nevertheless confer about compliance with the Court's First Sanctions Order and the potential for settlement. (June 5 Kruckeberg Decl. ¶ 9.)

Counsel conferred by phone later that day. (*Id.*) During the teleconference, Mr. Kruckeberg asked about the additional documents Mr. King had mentioned in his e-mail and about the availability of duplication services in the defendants' office where the defendants offered the documents for inspection and duplication (the defendants' office is also the defendants' home). (*Id.*) Because Mr. King did not know how the defendants planned to allow for duplication,

¹ The Court has already pointed out that, notwithstanding the defendants' later attempts to obstruct the plaintiffs' review and duplication of these documents, the defendants' offer was insufficient because the Court had ordered the defendants to provide complete responses to discovery requests by March 1, 2013. (Order on Pls.' Second Mot. for Partial Summ. J. and Second Mot. for Sanctions (Dkt. # 43) ("**Second Sanctions Order**"), at 17 (citing First Sanctions Order, at 8).)

1 Mr. Kruckeberg proposed having the documents sent out for duplication. (*Id.*) Mr. King said that
 2 he would inquire with his clients about sending the documents out for duplication. (*Id.*) After
 3 hearing nothing from Mr. King about duplication of documents, Mr. Kruckeberg renewed his
 4 request for complete responses to the plaintiffs' discovery requests. (*Id.*, Ex. G.) Once again,
 5 Mr. King did not reply. (*Id.* ¶ 11.) Thus, on May 10, 2013, Mr. Kruckeberg followed up by e-mail.
 6 (*Id.*, Ex. H.) Mr. King replied, stating only: "Sorry – I have been out of the office this week. I will
 7 follow up with my client and advise." (*Id.*, Ex. I.) Yet again, the plaintiffs heard nothing. (*Id.* ¶ 14.)
 8 Ten days later, on May 21, 2013, Mr. Kruckeberg followed up with an e-mail reminding Mr. King
 9 that the Court had ordered "complete responses without objection" by March 1, 2013—almost
 10 three months beforehand. (*Id.*, Ex. J.) Mr. King responded to Mr. Kruckeberg's e-mail another four
 11 days later, expressing no concern over his client's violation of this Court's Order, stating:
 12 "Nothing as of yet. I'll check with my client and get back to you." (*Id.*, Ex. K.) After six more days
 13 of silence, Mr. Kruckeberg gave the defendants a deadline of June 3, 2013, to comply with the
 14 Court's Order. (*Id.*, Ex. L.) Mr. Kruckeberg received an automated out-of-office response stating
 15 that Mr. King would not return until June 3rd. (*Id.*, Ex. M.) On June 3, Mr. King wrote that his
 16 client had 2,500 books available to be picked up, yet he didn't reply to Mr. Kruckeberg's earlier
 17 request or mention his clients' ongoing violation of the Court's discovery Order. (*Id.*, Ex. N.)
 18 Having diligently tried, without result, to resolve the defendants' noncompliance with the Court's
 19 Order, the plaintiffs filed their Second Motion for Sanctions, ECF Document No. 30, on June 5,
 20 2013.

21 **D. The Court Sanctioned the Defendants a Second Time and Again Ordered the**
 22 **Defendants to Respond to the Plaintiffs' Discovery Requests.**

23 The Court granted the plaintiffs' Second Motion for Sanctions, having "little difficulty in
 24 concluding" that the defendants' failure to fully comply with the Court's prior Order was willful.
 25 (Second Sanctions Order at 17.) The Court also had "no difficulty in concluding" that the plaintiffs
 26 had been prejudiced by the defendants' conduct. (*Id.* at 18.) The Court, therefore, concluded that

1 additional sanctions were warranted. (*Id.*)

2 The plaintiffs asked the Court to enter default judgment as a sanction or to enter factual
3 findings that the Thompsons and the corporate entities were alter-egos. (*Id.* at 18–19.) The Court
4 determined, however, that it could fashion a lesser sanction that would both punish the defendants
5 for their conduct while alleviating the prejudice the plaintiffs had experienced. (*Id.* at 19.)

6 Accordingly, the Court crafted its Order as follows:

- 7 1. The defendants were to produce, without objection, all of the financial records
8 pertaining to Mrs. Thompson by August 1, 2013.
- 9 2. The defendants and Mr. King were to file a certification with the Court by
10 August 1, 2013, that they had produced the records relating to Mrs. Thompson.
- 11 3. The defendants were to produce the remaining outstanding discovery covered by
12 the court’s First Sanctions Order by August 1, 2013.
- 13 4. The defendants and Mr. King were to file a certification with the Court by
14 August 1, 2013, that they had produced the records relating to the Court’s First
15 Sanctions Order.

16 (*Id.* at 19–20.)

17 Importantly, the Court warned the defendants that if they “fail[ed] to produce this
18 discovery having now been ordered to do so twice,” the Court would consider entering adverse
19 evidentiary findings or entering default judgment against the defendants. (*Id.* at 20.) The Court also
20 recognized that forcing the plaintiffs to go to trial on an incomplete factual record on September 3,
21 2013, would only compound the prejudice caused by the defendants’ “obstreperous behavior in the
22 discovery process.” (*Id.* at 21.) The Court, therefore, struck the trial date, noting the “detrimental
23 effect on [the Court’s] calendar and trial schedule” had been caused by the defendants’ conduct.
24 (*Id.*) The Court, once again, warned the defendants: “The court places Defendants on notice that it
25 will consider additional sanctions if there is any further delay in timely compliance with this
26 court’s orders.” (*Id.*)

**E. The Defendants Continue their Defiance of the Court’s Orders, Materially
Prejudicing the Plaintiffs’ Ability to Prosecute Their Claims.**

The defendants ignored the Court’s Second Sanctions Order. Mr. King’s only

1 communication with the plaintiffs since the Court entered its Second Sanctions Order has been to
 2 request “a stipulation regarding the scope of issues for trial.” (*See* Kruckeberg Decl., Ex. A.)
 3 Mr. Kruckeberg responded by stating that such a stipulation seemed premature, and he reminded
 4 Mr. King that additional discovery responses were due “in the next couple days.” (*Id.*, Ex. B.)
 5 Consistent with their pattern of conduct here, the defendants did not respond. (*Id.* ¶ 4.) They have
 6 failed to produce the documents and failed to file discovery certifications, all in defiance of the
 7 Court’s Order. (*Id.* ¶ 5.) More than eight months after being served with discovery requests, the
 8 defendants, despite the Court’s Orders, have yet to respond to any interrogatories or requests for
 9 production regarding Mrs. Thompson’s finances. (*Id.*) And the defendants have not yet made
 10 documents available for inspection and duplication, despite their earlier promise to do so. (*Id.*)
 11 Among those documents yet to be inspected and duplicated are the following:

- 12 • Invoices, proofs of payment, and all other documents relating to orders for
 13 reproduction, duplication, or printing of the plaintiffs’ books. (Mar. 28
 Kruckeberg Decl., Ex. H (Req. for Produc. Nos. 5–6).)
- 14 • Except for a Quickbooks sales report for the plaintiffs’ books, all other sales
 15 and payment records, account ledgers, and invoices relating to sales, gifts, or
 other transfers of the books. (*Id.*, Ex. H (Req. for Produc. Nos. 7–9).)
- 16 • Records relating to copies of the plaintiffs’ books that were damaged or
 17 destroyed (for which the plaintiffs received no royalties). (*Id.*, Ex. H (Req. for
 Produc. No. 10).)
- 18 • Records, receipts, account ledgers, and communications relating to copies of
 19 the books that were returned (for which the plaintiffs received deductions in
 royalty payments). (*Id.*, Ex. H (Req. for Produc. No. 11).)
- 20 • Records and documents relating to agreements or arrangements with Big
 21 Universe, Inc., Be There Bedtime Stories, LLC, or any other company that
 22 hosted a website on which the defendants made electronic copies of the books
 available without the plaintiffs’ permission. (*Id.*, Ex. H (Interrog. 3, Req. for
 Produc. Nos. 12–13).)
- 23 • Except for the distribution agreement, all records and documents relating to
 24 agreements or arrangements with Collage Greetings, LLC, or its affiliates,
 arising from or related to Collage Greetings’ distribution of copies of the
 25 plaintiffs’ books. (*Id.*, Ex. H (Req. for Produc. No. 15).)
- 26 • Except for annual filings and balance sheets, all other records, documents,
 memoranda, and communications relating to the financial affairs of

defendants Illumination Arts, Inc., Illumination Arts Publishing, L.L.C., and John Thompson (*Id.*, Ex. H (Req. for Produc. No. 37, 40).)

- Documents relating to the defendants' affirmative defenses. (*Id.*, Ex. H (Req. for Produc. Nos. 50–51, 61–67).)

More than 250 days after they were served, many of the plaintiffs' discovery requests remain unanswered. The Court has already sanctioned the defendants for their behavior. Twice. Because the defendants continue to ignore and defy the Court's Orders, the plaintiffs are no less prejudiced today than when the Court entered its Second Sanctions Order, notwithstanding the Court's repeated warnings that further defiance of the Court's Orders could result in additional sanctions, including entry of default judgment. The Court should not allow the defendants to continue this contemptuous behavior.

IV. AUTHORITY AND ARGUMENT

A. The Court Should Enter Default Judgment as a Sanction in Light of the Defendants' Extraordinary Violation of the Court's Orders.

The defendants' egregious behavior merits the sanction of default judgment. Courts may impose an array of sanctions against a party for violation of a discovery order, including entry of default judgment. Fed. R. Civ. P. 37(b)(2)(A). A "terminating sanction" like entry of default judgment is justified only by willfulness, bad faith, and fault. *Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096-97 (9th Cir. 2007). All that is required to show willfulness, bad faith, and fault is disobedient conduct within the control of the disobedient party. *Virtual Vision, Inc. v. Praegitzer Indus., Inc.*, 124 F.3d 1140, 1143–44 (9th Cir. 1997).

If willful conduct is present, the Ninth Circuit applies a five-part test (with three subparts to the fifth part) to determine "whether a case-dispositive sanction under Rule 37(b)(2) is just." *Connecticut Gen. Life Ins. Co.*, 482 F.3d at 1096. A court must weigh: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions. *Id.* The three "sub-parts" of the fifth factor

1 ask whether: the court (a) has considered lesser sanctions; (b) tried those lesser sanctions; and
2 (c) “warned the recalcitrant party about the possibility of case-dispositive sanctions.” *Id.*

3 In weighing the multiple factors that militate in favor of or against case-dispositive
4 sanctions, “the most critical factor is not merely delay or docket management concerns, but truth.”
5 *Id.* at 1097. The court must consider whether discovery violations make it impossible for the court
6 “to be confident that the parties will ever have access to the true facts.” *Id.* Where discovery abuse
7 makes it impossible for a district court to conduct a trial “with any reasonable assurance that the
8 truth would be available,” it is appropriate to reject lesser sanctions and enter dispositive ones. *Id.*

9 Where, as here, a court order is violated, the first two factors generally support terminating
10 sanctions and the fourth factor cuts against entering them. *Adriana Int’l Corp. v. Thoenen*, 913
11 F.2d 1406, 1412 (9th Cir. 1990). Thus the third and fifth factors become decisive. *Id.* In this case,
12 the risk of prejudice to the plaintiffs is strong, and the defendants’ continuing defiance of the
13 Court’s two prior Orders makes the threat of lesser sanctions entirely ineffective.

14 In examining the third factor—prejudice—more closely, the Court has already noted that it
15 has “no difficulty in concluding” that the plaintiffs have been prejudiced by the defendants’
16 conduct. (Second Sanctions Order at 18.) The Court also stated that forcing the plaintiffs to go to
17 trial on an incomplete record would only compound the prejudice caused by the defendants’
18 “obstreperous behavior in the discovery process.” (*Id.* at 21.) The defendants have provided no
19 new information since the Court’s Second Sanctions Order. The plaintiffs continue to suffer
20 prejudice. And that prejudice will only be amplified if the plaintiffs are forced to go to trial on the
21 issues remaining in this case with an incomplete factual record.

22 Turning to the fifth factor—the availability of lesser sanctions—the Ninth Circuit’s three-
23 subpart test is illuminating. First, the Court considered lesser sanctions in both its First Sanctions
24 Order and its Second Sanctions Order. Second, the Court has tried those sanctions. The Court
25 attempted monetary sanctions in its First Sanctions Order. The defendants ignored the Order and
26 the monetary sanctions remain unpaid. (*See* Kruckeberg Decl. ¶ 6.) The Court awarded additional

1 monetary sanctions in its Second Sanctions Order, and it also fashioned a creative certification
2 process whereby the defendants were ordered to produce the remaining discovery responses and to
3 file certifications with the Court swearing they had done so. Again, the defendants ignored the
4 Court's Order. Finally, the Court has warned the defendants—repeatedly—that their continued
5 behavior could result in case-dispositive sanctions. (*See* Second Sanctions Order at 20–21.)

6 Moreover, the “most critical factor” in unearthing the truth weighs heavily in favor of case-
7 dispositive sanctions. The defendants’ continued discovery violations make it impossible for the
8 Court “to be confident that the [plaintiffs] will ever have access to the true facts.” *Connecticut*
9 *Gen. Life Ins. Co.*, 482 F.3d at 1097. The defendants have continued to undermine a just decision
10 in this case by refusing to comply with court-ordered production of documents. By refusing to turn
11 over relevant information, the defendants not only prevent the plaintiffs from proving that
12 Mrs. Thompson should be personally liable for the entities’ contract liability, but also prevent the
13 plaintiffs from presenting a jury with the full picture of the defendants’ willful and egregious
14 copyright infringement, which is relevant to a damages calculation. The defendants have refused to
15 turn over documents showing how the plaintiffs’ work became available online, for free, on
16 various websites; how much commercial advantage the willful infringement of the plaintiffs’ work
17 generated for the defendants; whether any of the plaintiffs’ myriad demands to cease infringing
18 behavior had any deterrent effect on the defendants; and the extent to which the defendants knew
19 that their behavior constituted infringement and continued infringing anyway. The defendants’
20 discovery abuse and continuing defiance of the Court’s Orders has made it impossible to conduct a
21 trial with the reasonable assurance that the truth will ever be available to the parties or the
22 decision-makers. In the face of the defendants’ flagrant defiance, case-dispositive sanctions are the
23 only remaining means of alleviating the plaintiffs’ prejudice.

24 **B. Summary Judgment Is Appropriate on the Plaintiffs’ Contract-Related Claims.**

25 In addition to a third motion for sanctions, the Court authorized the plaintiffs to bring a
26 third motion for partial summary judgment relating to the issue of piercing the corporate veil with

respect to Mr. and Mrs. Thompson, and with regard to contract damages for Ms. Aldrich and Mr. Currier. (Second Sanctions Order at 20.)

1. Contract Damages for Ms. Aldrich and Mr. Currier Can Be Determined on Summary Judgment.

The Court previously held that the plaintiffs presented sufficient evidence to justify summary judgment as it relates to contract damages for Ms. Curtis. (*See* Second Sanctions Order at 9–10.) The Court, however, found insufficient evidence to support summary judgment with respect to contract damages for Ms. Aldrich and Mr. Currier. (*See id.*) The plaintiffs now supplement their earlier argument by providing declarations, with exhibits, sufficient to support the determination of contract damages on summary judgment.

As the plaintiffs explained in their previous Motion for Summary Judgment, ECF Document No. 32, dated June 5, 2013 (“*Second Summary Judgment Motion*”), Ms. Aldrich and Mr. Currier should have been compensated for their books, *at the very least*, as follows:²

	Aldrich	Currier
<i>All I See</i>	\$34,295.69	\$0.00
<i>Fun Is a Feeling</i>	\$15,414.08	\$0.00
<i>How Far to Heaven?</i>	\$0.00	\$3,816.84
Total	\$49,709.77	\$3,816.84

(Second Summary Judgment Motion at 9–10.)

Available tax records, however, show that Aldrich was paid an average of approximately \$3,203.84 each year between 1998 and 2009, for an approximate total of \$44,853.73, which represents an underpayment of \$4,856.04. (*See* Aldrich Decl. ¶ 2, Ex. A.) Available tax records for Mr. Currier show that he was paid an average of approximately \$274.83 each year during that same period, for an approximate total of \$3,297.96, which represents an underpayment of \$518.88. (*See* Currier Decl. ¶ 3, Ex. A.) The defendants have produced no contrary evidence in discovery despite this Court’s repeated orders to comply with discovery rules. Because there is no dispute of

² This calculation makes substantial inferences in favor of the defendants by *excluding* additional royalty amounts *due* for translation and e-book sales while *including* royalty amounts *paid* for the same by reference to Ms. Aldrich and Mr. Currier’s tax information.

fact regarding the underpayment of royalties, the Court should enter summary judgment on the issue of contract damages in the amount of \$4,856.04 for Ms. Aldrich and \$518.88 for Mr. Currier.

2. The Veil-Piercing Claim Relating to Mr. Thompson Can Be Determined on Summary Judgment.

The Court has previously stated that “[i]n order to disregard the corporate form based on a fraudulent transfer of assets, the court evaluates two factors: (1) the corporate form must be ‘used to violate or evade a duty,’ and (2) disregard of the corporate form must be ‘necessary and required to prevent unjustified loss to the injured party.’” (Order Granting in Part and Denying in Part Pls.’ Mot. for Partial Summ. J. (Dkt. # 29) (“*First Summary Judgment Order*”), at 13–14 (citing *Meisel v. M & N Modern Hydraulic Press Co.*, 645 P.2d 689, 692 (Wash. 1982).) To satisfy the first element of a veil-piercing claim, the court must find an abuse of the corporate form, which typically involves fraud, misrepresentation, or some form of manipulation of the corporation to the stockholder’s benefit and creditor’s detriment. (*Id.* at 14.) To satisfy the second element of a veil-piercing claim, the court must identify wrongful corporate activities that actually harm the party seeking relief, making disregard of the corporate form necessary. (*Id.*)

While the Court previously found evidence sufficient to pierce the veil between the corporate entities, the Court declined to do so with respect to Mr. Thompson on the basis that the record lacked evidence showing that Mr. Thompson had harmed the plaintiffs by personally dissipating any of the assets of Illumination Arts. (*Id.* at 18–19.) Mr. Thompson and the corporate defendants have now made that information available through the recent disclosure of their bank statements. Those statements reveal several material facts establishing that Mr. Thompson abused the corporate form during the period in which Illumination Arts failed to pay the plaintiffs:

- **The corporate entities began making payments on credit card accounts that Mr. Thompson had previously been paying from his personal account.** (*Compare, e.g.*, Kruckeberg Decl., Ex. C (showing payments from Mr. Thompson’s personal account on the Bank of America credit card account no. ending 0310), *with* Kruckeberg Decl., Ex. D (showing payments from the company account on the Bank of America credit card account no. ending 0310).)

- 1 • **The corporate entities began footing the bill for Mr. Thompson's grocery and other expenses in late 2011.** (*Compare, e.g.,* Kruckeberg Decl., Ex. E (showing Mr. Thompson spending \$576.14 on groceries and similar items in January of 2011 and only \$2.16 on such items in January of 2012), *with* Kruckeberg Decl., Ex. F (showing the company purchasing \$0.00 in groceries and similar items in January of 2011, but \$344.07 on such items in January of 2012), *and compare* Kruckeberg Decl., Ex. G (showing Mr. Thompson's grocery bill falling from \$641.15 in March of 2011 to \$1.75 in March 2012), *with* Kruckeberg Decl., Ex. H (showing the company's grocery bill of \$45.68 in March of 2011 rocketing to \$789.06 in March of 2012).)
- 2 • **The corporate entities funded one of Mr. Thompson's personal real-estate partnerships.** (*See* Kruckeberg Decl., Ex. I (showing the company's \$4,000.00 wire transfer to Yorkshire Associates on March 29, 2012); *see also* Kruckeberg Decl., Ex. J (2010 1099 showing Mr. Thompson as General Partner of Yorkshire Associates receiving \$6,888.00 in compensation from the partnership in 2010).)
- 3 • **Mr. Thompson freely transferred money between his personal account and the company account.** (*See, e.g.,* Kruckeberg Decl., Ex. K (showing transfers between Mr. Thompson's personal account (with account no. ending 6689) and the company account (with account no. ending 4712).)
- 4 • **In early 2012, the corporate entities began paying for salon services, pet supplies, and dental work—i.e., clearly personal expenses Mr. Thompson should have paid for with personal funds.** (*See* Kruckeberg Decl., Ex. L (showing the company paying for services and/or supplies at Salon Azur, Rogue Valley Pet, and LWIT Dental).)

5 This evidence shows that, rather than paying royalties due to the plaintiffs, Mr. Thompson caused
 6 the corporate defendants to fund his lifestyle. This is precisely the type of case for which the
 7 doctrine of corporate veil piercing was created. Mr. Thompson should be personally liable for the
 8 corporate defendants' contract liability.

9
 10 **C. The Court Should Award the Maximum Amount of Statutory Damages on the**
 11 **Plaintiffs' Copyright Claims.**

12 If the Court enters default judgment as a sanction for the defendants' astonishing disregard
 13 of the Court's discovery orders and the rules, it should enter judgment in an amount equal to the
 14 statutory maximum for each of the plaintiffs' three copyright infringement claims. The Court
 15 previously acknowledged that despite the fact that the defendants offered no response to the
 16 plaintiffs' arguments regarding statutory damages, the Court was prohibited from entering
 17 summary judgment on the issue because of *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S.

1 340, 355 (1998). (Second Sanctions Order at 12.) The Court stated that “[e]ven considering
 2 Plaintiffs’ undisputed evidence in favor of an award of the statutory maximum, the selection of
 3 such an award requires the exercise of discretion by the fact finder.” (*Id.* at 14.)

4 The *Feltner* case, which relied on the Seventh Amendment right to jury trial, does not
 5 apply, however, in the context of default judgment. Case law dating from the eighteenth century
 6 “makes clear that the constitutional right to jury trial does not survive the entry of default.” *Benz v.*
 7 *Skiba, Skiba & Glomski*, 164 F.R.D. 115, 116 (D. Me. 1995) (citing *Brown v. Van Bramm*, 3 Dall.
 8 [U.S.] 344, 355 (1797); *see also Adriana Int’l Corp. v. Lewis & Co.*, 913 F.2d 1406, 1414 (9th Cir.
 9 1990) (holding that there is no right to jury trial under Fed. R. Civ. P. 55(b)(2) or the Seventh
 10 Amendment after entry of default judgment); *Olcott v. Delaware Flood Co.*, 327 F.3d 1115, 1124
 11 (10th Cir. 2003) (“Defendants do not have a constitutional right to a jury trial following entry of
 12 default.”); *Graham v. Malone Freight Lines*, 314 F.3d 7, 16 (1st Cir. 1999) (“Neither the Seventh
 13 Amendment nor the Federal Rules of Civil Procedure require a jury trial to assess damages after
 14 entry of default.”); *Henry v. Sneiders*, 490 F.2d 315, 318 (9th Cir. 1974) (“[T]he Seventh
 15 Amendment right to trial by jury does not survive a default judgment.”). In addition, an award of
 16 statutory damages under the Copyright Act is entirely appropriate in the context of default
 17 judgment. *Microsoft Corp. v. Nop*, 549 F. Supp. 2d 1233, 1238 (E.D. Cal. 2008) (quoting
 18 *Microsoft Corp. v. McGee*, 490 F.Supp.2d 874, 882 (S.D. Ohio 2007) (“[S]tatutory damages are
 19 appropriate in default judgment cases because the information needed to prove actual damages is
 20 within the infringers’ control and is not disclosed.”).

21 In *Warner Brothers Entertainment Inc. v. Caridi*, 346 F. Supp. 2d 1068, 1073–74 (C.D.
 22 Cal. 2004), the court determined that the statutory maximum award of \$150,000 per work was
 23 appropriate on the entry of default judgment. The *Caridi* court determined that because it was
 24 entering default judgment, the allegations in the plaintiff’s complaint had to be taken as true. *Id.*
 25 The court found that the “particularly egregious” behavior of the infringer also justified an award
 26 of the statutory maximum of \$150,000 per work. *Id.* What is more, the court stated that the

1 egregious infringement was compounded by the defendants' failing to "proffer any defense or
2 participate in discovery." *Id.*

3 In a similar case from our circuit, after the entry of default, the court entered the maximum
4 damage award of \$150,000 per work for the infringement of each of nine works. *IO Grp., Inc. v.*
5 *Antelope Media, LLC*, C-08-4050 MMC, 2010 WL 2198707, at *1 (N.D. Cal. May 28, 2010). In
6 *Antelope Media*, the court determined that the statutory maximum was appropriate for several
7 reasons, including the fact that (1) the infringers gained commercial advantage by using the
8 plaintiff's copyrighted works; (2) the infringers continued their infringing activity after being
9 notified of the copyright action; and (3) the infringers "attempt[ed] to prohibit [the] plaintiff from
10 learning the full extent of the infringing conduct." *Id.*

11 An award of the statutory maximum is appropriate here. The Court has already observed
12 that the plaintiffs have presented "undisputed evidence in favor of an award of the statutory
13 maximum." (Second Sanctions Order at 14.) As in *Caridi* and *Antelope Media*, the behavior of the
14 infringers in this case has been particularly egregious. The defendants have gained commercial
15 advantage by continuing to sell the plaintiffs' copyrighted books after the defendants' license to do
16 so was revoked. The defendants also gained commercial advantage by printing advertising for their
17 publishing company and other works they were selling in the rear pages of the infringing books.
18 The defendants presumably derived advertising revenue or Internet traffic from the unlicensed
19 electronic publication of the books on Google Books, among other websites. But because the
20 defendants have refused to participate fully in the discovery process, the plaintiffs are unable to
21 learn the full extent of the defendants' infringement and the commercial advantage they derived
22 from it. Finally, the defendants continued their infringing activity after receiving multiple demand
23 letters from the plaintiffs and even after this suit commenced. An award of the statutory
24 maximum—\$150,000.00 for each of the plaintiffs' three books—is appropriate given these
25 circumstances.

D. The Court Should Award the Plaintiffs Their Fees and Costs.

1. The Court Should Award the Plaintiffs Their Discovery-Related Fees and Costs Since the Previous Award.

The Court should award the plaintiffs the legal expenses incurred in filing this third motion for sanctions. Courts have discretion to award fees and costs in addition to the sanctions discussed above. Fed. R. Civ. P. 37(b)(2)(C). Moreover, federal courts have “inherent power to impose sanctions against both attorneys and parties for bad faith conduct in litigation or for willful disobedience of a court order.” *Heath v. F/V ZOLOTOTI*, 221 F.R.D. 545, 552 (W.D. Wash. 2004) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)). The court’s ability to impose such sanctions stems from the power “vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” *Id.* (citing *Chambers*, 501 U.S. at 43).

The defendants’ noncompliance with the Federal Rules and continuing disobedience of the Court’s orders has needlessly extended this litigation. The Court should impose sanctions against both the defendants and its counsel, and award the plaintiffs their costs and reasonable attorneys’ fees associated with policing discovery and filing this third motion for sanctions.

2. The Court Should Award the Plaintiffs Their Fees and Costs Under the Copyright Act.

The Court should award attorneys’ fees and costs to the plaintiffs as prevailing parties under the Copyright Act. *See* 17 U.S.C. § 505. Courts consider five non-exclusive factors when determining whether an award of attorneys’ fees is appropriate under the Copyright Act. *Wall Data Inc. v. Los Angeles Cnty. Sheriff’s Dep’t*, 447 F.3d 769, 787 (9th Cir. 2006). The five factors are: (1) the degree of success obtained by the prevailing party; (2) the frivolousness of the losing party’s claim; (3) the motivation of the losing party; (4) the reasonableness of the losing party’s legal and factual arguments; and (5) the need to advance considerations of compensation and deterrence. *Id.*; *see also Brayton Purcell LLP v. Recordon & Recordon*, 487 F. Supp. 2d 1124, 1129 (N.D. Cal. 2007).

All five factors weigh toward an award of fees and costs. The plaintiffs have been

1 successful in their claim because the Court has already determined that each of the defendants is
2 liable for willful copyright infringement. From the outset, the defendants' defenses have been
3 frivolous and unreasonable. The Court noted that the evidence of willful infringement was
4 "overwhelming" and that the plaintiffs' notice to the defendants of their infringement was
5 "unequivocal." (First Summary Judgment Order at 22.) Moreover, the need for deterrence is great
6 where, as here, the defendants have continually obstructed the litigation process, requiring the
7 plaintiffs to file three separate motions for sanctions. An award of fees and costs under the
8 Copyright Act is appropriate.

9 V. CONCLUSION

10 The Court has already sanctioned the defendants—twice—for their repeated defiance of the
11 Court's Orders. By continually obstructing the discovery process and participating in the litigation
12 only when it is convenient for them, the defendants have effectively defaulted. The plaintiffs
13 continue to be prejudiced by the defendants' behavior and ask the Court to enter default judgment
14 against the defendants to alleviate that prejudice. The Court should also award Ms. Aldrich and
15 Mr. Currier their contract damages and pierce the corporate veil between the corporate defendants
16 and Mr. Thompson. In addition, the Court should award the maximum statutory damages in the
17 total amount of \$450,000 on entry of default judgment against the defendants. Finally, the Court
18 should award plaintiffs the legal expenses they have incurred to police discovery and bring their
19 copyright claims.

20 DATED this 8th day of August, 2013.
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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of August, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 8th day of August, 2013, at Seattle, Washington.

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